**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION**

ELLEN JOHNSTON PLAINTIFF

V. CAUSE NO. 2:07cv42 WAP, EMB

ONE AMERICA PRODUCTIONS, INC., TWENTIETH CENTURY-FOX FILM CORPORATION AND JOHN DOES 1 AND 2 DEFENDANTS

PLAINTIFF'S RESPONSE TO MOTION TO STRIKE EXHIBITS A-E TO PLAINTIFF'S RESPONSE, etc. AND RESPONSE TO OPPOSITION OF DEFENDANTS' TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

COMES NOW, Plaintiff, Ellen Johnston, by and through counsel, W.O. Luckett, Jr. of Luckett Tyner Law Firm, P.A., and files and serves her combined Response to Motion to Strike Exhibits A-E to Plaintiff's Response, etc. and Response to Opposition of Defendants' to Plaintiff's Motion for Leave to Amend Complaint and states as follows:

1. Defendants argue that the Plaintiff's request for leave to amend Complaint so as to assert the tort of intentional infliction of emotional distress is based upon the same conduct which is set forth in her Complaint. In this respect the Defendants are correct. Perhaps Plaintiff's motion is a bit superfluous in attempting to amend and pursue intentional infliction of emotional distress in addition to the invasion of privacy claim. Plaintiff's counsel was searching for the right moniker to affix to the intentional wrong which was worked upon Plaintiff when she and others were duped into participating in what they thought was a routine church gathering where a soul was saved. Frankly it matters not what the tort is called. The fact remains a tort was committed under applicable law as set forth in the Plaintiff's Response to Defendants' Motion to Dismiss for Failure to State Claim.

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The Defendants deliberately and intentionally portrayed the Plaintiff in a highly offensive false light and misappropriated her likeness for their own commercial use and benefit without her consent. As the Plaintiff argued earlier, the Defendants could well have used "extras" or "professional actors" in the subject scene of the movie, but the movie would have lost its shtick.

2. As to the motion by the Defendants to strike the exhibits attached to Ms. Johnston's Response to the Motion to Dismiss for Failure to State Claim, the Defendants argue that by their attaching to their motion to dismiss a number of matters and documents which were not "in the pleadings" they did somehow not per Rule 12(b) convert the motion to one of summary judgment. Rule 12(b) states that:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Defendants rely on of Curry v. Shaw School Dist., 2007 WL 670962 (N.D. Miss.), 34 NDLR P. 123 Curry provides that the Federal Courts have complete discretion to determine whether or not to accept the submission of any material beyond the Pleadings. In the Curry case, Judge Pepper decided not to consider a couple of excerpts from transcripts of some due process hearings which were proffered by the Plaintiffs. The Court went on to state that before it will enter a judgment for Defendants in a Rule 12(b)(6) motion, "it must appear beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

3. Defendants argue that the Court can take judicial notice of the various documents and data which were attached to the Defendants' Motion to Dismiss for Failure to State Claim. Plaintiff

concedes that the Court can take judicial notice of the Complaint, and arguably, the entire movie *Borat*. However, the transcript of the Church camp episode and the copies of the various treatises and encyclopedic information regarding the Pentecostal religion is clearly outside the pleadings. Defendants contend that since the attachments they placed before the Court "outside the pleadings" are "central" to the Plaintiff's claims that these are not really "matters outside the Pleadings." Plaintiff counters that what she has attached in her Response in Opposition to Motion to Dismiss for Failure to State Claim are also "central" to her claim and that much of what the parties have submitted are outside the pleadings and this convert the Rule 12 motion into a Rule 56 motion.

4. Defendants argue that the transcribed excerpt of an interview by Sacha Baron Cohen should be stricken because it constitutes hearsay. However, said transcript was correctly and accurately prepared by Carol Edwards, a paralegal with Luckett Tyner Law Firm, and was recorded directly from the National Public Radio website. This interview was aired nationwide by National Public Radio. It has inherent trustworthiness in that it is Mr. Cohen himself whose voice was recorded. This is distinguishable from the "Front Line" television news segment where commentary was offered to explain what was shown in pictures. Moreover, the interview with Cohen constitutes a FRE 803(6) exception to hearsay because it is a record of the regular activity of National Public Radio. Defendants attack the work from the Book entitled *Clearance and Copyright: Everything the Independent Film maker Needs to Know*. They have come to their own conclusion that the work is not "scholarly" and that the excerpt is not complete. The Plaintiff chose to use an excerpt because copying the entire book is certainly not necessary for the purposes of which it is used. The excerpt supports Plaintiff's legal arguments with a plain language rendition of current law.

WHEREFORE, PREMISES CONSIDERED, Plaintiff urges the Court to exercise its discretion to accept the documents and other things which have been filed by both parties outside the pleadings to deny defendants Motion to Strike Exhibits A-E to Plaintiff's Response to Motion to Dismiss for Failure to State Claim, and to render as moot the Plaintiff's request to amend her Complaint in that it is probably superfluous.

THIS the 7th day of August, 2007

Respectfully Submitted,
ELLEN JOHNSTON

/s/ William O. Luckett, Jr.
W.O. LUCKETT, (MSB# 1487)

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2007 I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following person: **John Henegan**.

/s/ W.O. Luckett, Jr.
W.O. LUCKETT, JR.